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SUPREME COURT, U.S.
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No. 84-1222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FARRELL KAHN, Petitioner,

vs.

ALEXANDER GRANT & COMPANY, Respondent

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OPPOSITION OF ALEXANDER GRANT
& COMPANY TO THE MOTION OF
FARRELL KAHN TO EXPEDITE
CONSIDERATION OF CERTIORARI PETITION

Alexander Grant & Company ("Alexander Grant") opposes the motion of Farrell Kahn for an order expediting consideration of his Petition for Writ of Certiorari, and in opposition thereto states as follow:

1. On August 22, 1984, a unanimous panel of the United States Court of Appeals for the Eighth Circuit held that the complaint filed by Alexander Grant had stated a RICO claim against Tiffany Industries and certain Tiffany officials, including Farrell Kahn. Alexander Grant's lengthy and detailed complaint attacked over one inch of forged documents which had been sent through the United States mail specifically in order to defraud Alexander Grant. On October 31, 1984 the Eighth Circuit denied petitions by Tiffany and Farrell Kahn for rehearing and rehearing en banc, and on November 21, 1984, that same Court denied similar motions for stay of the mandate.

2. On January 2, 1985, Tiffany Industries filed its petition for certiorari, in Supreme Court case No. 84-1084.

That petition, served on all parties including Farrell Kahn, referred to the fact that petitions for certiorari were pending in four RICO cases before this Court, including Sedima, S.P.R.L. v. Imrex Co., No. 84-648 and American National Bank and Trust Co. v. Haroco, No. 83-2529.

3. On January 14, 1985, this Court granted certiorari in Sedima and Haroco. Nevertheless, despite this fact and the fact that certiorari was requested two weeks earlier in Tiffany, Farrell Kahn still made clear that he intended to take the entire allotted 90 days and filed his petition for certiorari on January 29, 1985. Accordingly, on January 18, 1985, counsel for Alexander Grant requested an extension of time to respond to the petition for certiorari in Tiffany (No. 84-1084), due to the related nature of the issues involved in the petitions. This request, a copy of which was received by Farrell Kahn, was granted and this Court entered an order on January 23, 1985 in Tiffany (No. 84-1084) permitting Alexander Grant until February 28, 1985 to answer that petition. Farrell Kahn also received a copy of that order.

4. Given Farrell Kahn's delay in proceeding with his petition for certiorari, it is neither fair to this Court nor to Alexander Grant to now request expedited treatment. Farrell Kahn has known for some time that this Court was considering and had indeed granted the other petitions, yet he delayed filing his petition until four weeks after the Tiffany petition was filed. If, indeed, Kahn's issues were worthy of this Court's special attention, he should have brought the issue to the Court's attention when the Court was initially deciding what cases to take. Moreover, having delayed consideration of the Tiffany petition, despite

having in his possession all of the facts which he now has, and which form the basis of the present motion, Farrell Kahn seeks to require Alexander Grant to respond to his petition on an expedited basis despite the fact that he took no effort to file his petition in less than the ninety days allotted to him. Such actions are neither fair to Tiffany nor to Alexander Grant, and thus the motion should be denied on procedural grounds.

5. The substantive issues raised by Farrell Kahn only confirm that expedited treatment is not warranted. Farrell Kahn's first issue -- whether a tool of an enterprise can have standing under RICO -- is not an issue of recurring importance or one arising in many cases. Accordingly, it is not worthy of separate review when this Court has already accepted two cases to set forth guidelines on civil RICO. Moreover, as the Eighth Circuit panel noted, Cenco v. Seidman & Seidman, 686 F.2d 449 (7th Cir.), cert. denied, 459 U.S. 880 (1982), is distinguishable from the case brought by Tiffany and Kahn to this Court. The injury in Cenco was indirect because the predicate acts (fraud in the sale of securities) were directed at the Cenco shareholders and not the accountants, and the accountants suffered only indirect injury (the money that they had to pay to settle class actions). In this case, the mail and wire fraud was directed at Alexander Grant and it suffered direct injury as a result of a massive fraud against it. This Court does not hear cases when there is no true conflict among the lower courts. Finally, as the author of Cenco himself made clear in subsequent cases, see Sutcliff, Inc. v. Donovan Bros., 727 F.2d 648 (7th Cir. 1984), what Farrell Kahn calls "standing limitations" cannot be imposed where they conflict

with the language and legislative history of a statute. The language and legislative history of RICO clearly do not permit the Cenco holding.

6. Farrell Kahn's second issue -- whether the pattern of racketeering activity must succeed in generating money in order for a civil RICO action to lie -- is not an issue of general importance to future cases. Moreover, to hold that money must be generated ignores the statutory language and common sense. In contrast to section 1962(a) of RICO, which specifically refers to "income derived from a pattern of racketeering activity," section 1962(c) prohibits the defendant from conducting the affairs of an enterprise through a pattern of racketeering activity. Where this occurs, the statute provides a RICO damage claim regardless of the financial success of the operation. As stated by the Eighth Circuit panel:

> "Grant's complaint sufficiently alleges that its injury resulted from the operation of Tiffany through a pattern of racketeering activity. Moreover, Kahn's argument would lead to the anomalous result that the racketeering activity must be allowed to proceed to successful completion before civil recovery is permitted. No interpretation of the plain language of RICO's civil provisions supports the position that Grant must silently tolerate the significant costs and risks associated with ongoing fraud before it seeks redress."

Because of movant's procedural defaults and because the issues that Farrell Kahn seeks to raise are not sufficiently weighty to merit certiorari, this Court should deny the motion to expedite.

Respectfully submitted,

ALEXANDER GRANT & COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 1985, Respondent Alexander Grant & Company's "Opposition To The Motion Of Farrell Kahn To Expedite Consideration Of Certiorari Petition" in No. 84-1222 was hand-delivered to the following counsel of record at the office of each or to an employee therein:

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The foregoing are counsel of record for all parties required to be served in this case. This service is made pursuant to Supreme Court Rule 28.3.

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